Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

NO. 79-512

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner
v.
LAURO DE LOS SANTOS AND
SEATTLE STEVEDORE CO.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amici Curiae of Apex Marine Corp., Atlantic Richfield Company, American President Lines, Ltd., American Trading Transportation Company, Inc., Central Gulf Lines, Inc., Coastal Corporation, Columbia Transportation Division Oglebay Norton Company, Cove Shipping Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corporation, Lykes Bros. Steamship Co., Inc., Ogden Marine, Inc., Prudential Lines, Inc., Sea-Land Services, Inc., Sea Train Lines, Inc., Transeastern Steamship Corporation, Trinidad Corporation, United States Lines, West Coast Shipping Company, Inc., Zapata Tankship, Inc. In Support Of Scindia Steam Navigation Co., Ltd., Petitioner

E. D. VICKERY
3710 One Shell Plaza
A.C. 713 224-8380
Houston, Texas 77002
Attorney for Amici Curiae

ROYSTON, RAYZOR, VICKERY & WILLIAMS
Of Counsel

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
CONSENT OF PARTIES	1
STATEMENT OF INTEREST	2
THE ULTIMATE ISSUE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	6
The Background	6
The Primary Congressional Concern	8
How Did Congress Approach Its Primary Safety Objective	10
The Accident	12
As Stevedore Is Independent Contractor, Shipowner Has No Duty To Supervise Its Operations	13
Stevedore Has Duty To Comply With Safety & Health Regulations For Longshoring	15
Proposed Rule Of Court Below Permits Stevedore To Disregard Safety Regulations	16
Congress Placed Primary Responsibility For Safety On Stevedore Under Land-Based Negligence Principles	18
When Only Stevedore Has Actual Knowledge Of The Condition, Imposing Liability On The Shipowner Defeats Congressional Goal Of Promoting Safety	20
Stevedore Assumes Risk Not The Longshoremen	23
As Congress Intended The Vast Improvements In Compensation Benefits Meet Needs Of Longshoremen	25
Blindfolding The Jury	27
Fifth Circuit Has Followed Congressional Safety Mandate	28
CONCLUSION	30
ADDENDUM A (Extracts from Deep Sea and Coastwise Longshore and Cotton Agreement, Texas Ports and the Port of Lake Charles, Louisiana, effective October 1, 1977 Terminating September 30, 1980, between West Gulf Maritime Association, Inc., and the South Atlantic and Gulf Coast District, International Longshoremen's Association, and affiliated deep sea locals from Lake Charles, Louisiana to Brownsville, Texas.)	A-1

Page

ADDENDUM B (Table Showing Effect of Assumed Escalation of Benefits of 7% Per Year for 50 Years) A-5

ADDENDUM C (Mathematical Calculations Of Spendable Income) A-7

ADDENDUM D (Extract From Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess. on S.2318, S.525 and S.1547) A-10

LIST OF AUTHORITIES

CASES Page

Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) 15

Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977) 18

Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977) 15, 28

Chavis v. Finnlines Ltd., O/Y, 576 F.2d 1072 (4th Cir. 1978) 15, 18

Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979) 15, 18

Cox v. Flota Mercante Grandcolombiano S.A., 577 F.2d 798 (2d Cir. 1978) 14, 18

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 13, 17, 18, 20, 28

Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977) 15, 28

Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977), *cert. denied*, 435 U.S. 861 (1978) 15, 28

Hickman v. Jugoslavenska Linijska Providba Rijeka, Zvir, 570 F.2d 449 (2d Cir. 1978) 18

Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir. 1977), *cert. denied*, 434 U.S. 861 (1978) 14, 18

Italia Societa Per Azioni De Navigazione v. Oregon Stevedoring Company, Inc., 376 U.S. 315 (1964) 30

Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) 19

Lubrano v. Royal Netherlands Steamship Company, No. 79-7228 (2d Cir., March 31, 1980) 14, 15

Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977) 18

Munoz v. Flota Mercante Grandcolombiana S.A., 553 F.2d 837 (2d Cir. 1977) 14, 18

Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979) 9, 14, 22

CASES

Page

Riddle v. Exxon Transp. Co., 563 F.2d 1103 (4th Cir. 1977) 14, 15, 18
Roberts v. Andrew Martin Sea Services, Inc., No. 78-2219 (5th Cir., May 30, 1980) 28
Ruffino v. Scindia Steam Navigation Co., Ltd., 559 F.2d 861 (2d Cir. 1977) 18
Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956) 7, 9, 12
Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 7, 9
Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), petition for cert. pending No. 79-1240 ..... 15, 28
Tipton v. Socony Mobil Oil Company, Inc., 375 U.S. 34 (1963) 27
United States v. Reliable Transfer, 421 U.S. 397 (1975) .. 17
Wescott v. Impressas Armadoras, S.A. Panama, 564 F.2d 875 (9th Cir. 1977) 15

UNITED STATES STATUTES

29 U.S.C.A. § 653(b)(2) 15
29 U.S.C.A. § 676 26
33 U.S.C.A. § 901ff 6
33 U.S.C.A. § 903(a) 11
33 U.S.C.A. § 905(b) 2, 6, 13
33 U.S.C.A. § 906 10
33 U.S.C.A. § 910 (f) and (g) 10
33 U.S.C.A. § 933 7
33 U.S.C.A. § 941 15

CODE OF FEDERAL REGULATIONS

29 C.F.R. § 1918.2(a) 15
29 C.F.R. § 1918.3(c) 16
29 C.F.R. § 1918.53(a)(5) 16, 21
29 C.F.R. § 1918.53(c)(1) 16, 21
29 C.F.R. § 1918.53(c)(2) 22
29 C.F.R. § 1918.91(c) 21

TEXTS

Restatement (Second) of Torts, Section 414 14

Page

MISCELLANEOUS

Compendium 1973, page 131 26
Hearings Before the Select Subcommitte on Labor of the Committe on Eduction and Labor, House of Representatives, 92d Cong. 2d Sess., on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023, page 106 8
Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess. on S. 2318, S. 525 and S. 1547, pages 307-310 29
The Report of The National Commission on State Workmen's Compensation Laws, 1972, page 56 26
H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 5, reprinted in 1972 U.S. Code Cong. and Ad. News 4698, at 4703 .... 7, 11, 29
H. Rep. at 1 and 4699 ..... 9, 25
H. Rep. at 6 and 4703 .....9, 12, 18, 21
H. Rep. at 7 and 4704 12
H. Rep. at 8 and 4705 16
S. Rep. No. 92-1125, 92d Cong., 2d Sess. 9 (1972) 7, 11, 29
S. Rep. at 2 .....8, 9, 15, 16, 25
S. Rep. at 10 .....9, 12, 18, 21
S. Rep. at 11 12

NO. 79-512

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner
v.
LAURO DE LOS SANTOS AND
SEATTLE STEVEDORE CO.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amici Curiae of Apex Marine Corp., Atlantic Richfield Company, American President Lines, Ltd., American Trading Transportation Company, Inc., Central Gulf Lines, Inc., Coastal Corporation, Columbia Transportation Division Oglebay Norton Company, Cove Shipping Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corporation, Lykes Bros. Steamship Co., Inc., Ogden Marine, Inc., Prudential Lines, Inc., Sea-Land Services, Inc., Sea Train Lines, Inc., Transeastern Steamship Corporation, Trinidad Corporation, United States Lines, West Coast Shipping Company, Inc., Zapata Tankship, Inc. In Support Of Scindia Steam Navigation Co., Ltd., Petitioner

To The Honorable Judges Of Said Court:

CONSENT OF PARTIES

All of the parties in this case have given their written consent to the filing of this Brief *Amici Curiae* in support

of the Petitioner and such written consents have been filed with the Clerk.

STATEMENT OF INTEREST

Amici Curiae consist of twenty-one individual American steamship companies whose operations are worldwide. They are representative of all steamship companies who do business in the United States and therefore share a common exposure as third parties to personal injury and death claims by longshoremen and other harbor workers in the United States. They are involved in many lawsuits brought against them seeking damages under the new negligence action provided for by Congress in the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. §905(b). Your Amici, therefore, are vitally interested in trying to see that the negligence rules adopted by the Court under the 1972 Amendments are fully consistent with the primary objectives of the Congress

(1) to promote safety

(a) by strengthening the stevedore employer's incentive to provide the fullest measure of on-the-job safety by requiring the stevedore to bear the economic costs of injuries which are caused by unsafe conditions for which the stevedore is responsible, and

(b) to require the shipowner to bear the economic costs of unsafe conditions for which it is responsible, and

(2) to provide fully adequate workmen's compensation benefits to meet the needs of the injured employee and his family.

As this is the first case in which the land-based negligence principles mandated by Congress to be used under

the 1972 Amendments have been before the Court, your Amici submit this Brief in the hope that it will be helpful to the Court in adopting those rules from land-based negligence law that will give full effect to these Congressional objectives.

THE ULTIMATE ISSUE

What rules of negligence law will best serve to accomplish the Congressional safety objective?

SUMMARY OF ARGUMENT

In its 1972 Amendments to the Longshoremen's Act, Congress sought to eliminate the injustices which had arisen under the Act because of the third party claims against shipowners by longshoremen for injuries sustained aboard vessels and the indemnity actions by shipowners against the stevedore employer of the longshoremen. The injustices included no increase in compensation benefits for 12 years, and had resulted in so many third party claims that it was an unacceptably expensive method of compensating longshoremen for their injuries.

Since longshoring was a high risk occupation, in extensively amending the Act in 1972 the primary Congressional concern was to provide "the fullest measure of on-the-job safety" for longshoremen. It sought to meet this concern in two ways: (1) By encouraging safety by making stevedore employers bear the cost of unsafe conditions by having to pay fully adequate compensation benefits, and by providing longshoremen a new cause of action for negligence against shipowners which was fairer to all concerned and would promote safety; and (2) By providing fully adequate compensation and medical benefits to the injured longshoreman and his family without their having to pursue the uncertainty of seeking damages from a third party.

The stevedore was in complete control of the cargo operations when a sack of wheat fell from a pallet ordered by the stevedore's gang foreman to be held suspended by the vessel's winch over the area in which Santos was ordered to work. Santos claimed the accident occurred because the winch brake would not hold the load, but only the stevedore had any knowledge of any problem with the winch.

The expert stevedore is an independent contractor and as the shipowner retains no control over the details of the stevedore's operations, under land-based negligence principles it has no duty to supervise the stevedore's operations.

The stevedore has the duty to comply with the Safety & Health Regulations for Longshoring. The proposed rule of the Court below permits the stevedore to disregard its affirmative duties to stop using the winch and to immediately report it to the shipowner and apparently to bear none of the cost of the injury. While the comparative fault rule would provide the strongest safety incentive for both shipowner and stevedore, this apparently is precluded by recent decisions of the Court.

Most of the Courts of Appeals have recognized that Congress placed the primary responsibility for the safety of the longshoremen on the stevedore as they are in the best position to eliminate the risk of injury. The proposal of the Court below that the shipowner's conduct be assessed under a "reasonable care under the circumstances" rule simply affords no standard by which judges and juries can assess the shipowner's conduct in the light of the "delicate balance" for safety which Congress mandated based on the most basic safety principle—the party who is responsible for an unsafe condition, has a duty to avoid it or to prevent an accident should pay for all the costs of any injuries which occur.

The result in the Court below imposes liability on the shipowner when only the stevedore had actual knowledge of the danger in the area under its control. The stevedore is the expert and has complete control over the operations and is in the best position to recognize and avoid any danger. Relieving the stevedore of the costs of this accident and making the shipowner pay the costs when it in fact had no knowledge of the danger and could not correct it utterly destroys the "delicate balance" for safety which Congress mandated.

This "delicate balance" for safety can be maintained in the area over which the stevedore has control only by placing it on the party who has the initial actual knowledge of an unsafe condition, and the duty either to stop work, to avoid it or to correct it. Until the shipowner has actual knowledge of such a condition in the stevedore controlled area, it is not in a position to eliminate a risk of injury of which it is in fact unaware.

It is the stevedore who assumes the risk of injuries, not the longshoremen. Until the shipowner breaches a duty owed to the longshoremen no question of assumption of risk or comparative negligence arises. The Court below did not appreciate that the shipowner has no control over the hiring of longshoremen, as it is controlled by gang foremen selected by his labor union. The Court below erroneously relied on the fiction that longshoremen face trouble if they refuse to work under dangerous conditions.

The vast improvement in compensation benefits have met the needs of longshoremen as Congress intended. From a maximum of $70 per week ($3,640 per year), the benefits have increased to the present maximum of $426.26 ($22,165.52 per year). If total and permanently disabled, a 41-year old longshoreman who lives 31 years, would receive approximately $2,263,834 in weekly payments. These exceed the amounts recommended by the

National Commission on State Workmen's Compensation Laws.

By withholding from the jury the full truth—all knowledge that all of an injured longshoreman's medical expenses have been paid and he has received weekly compensation up to $426.26 per week while recuperating from his injury—the courts create the false impression with the jury that the shipowner is the only party from whom the longshoreman can obtain compensation for his injuries, to the substantial prejudice of the shipowner.

The Court of Appeals for the Fifth Circuit has followed the Congressional safety mandate and achieved the "delicate balance" for safety which Congress desired. In doing so it has substantially reduced the number of third party cases, thus converting litigation costs into improved compensation benefits as Congress intended.

The Congressional safety objective can be achieved only by utilizing this basic safety rule as stated by the Court: "Liability should fall on the party best situated to adopt preventive measures and thereby reduce the likelihood of injury."

ARGUMENT

The Background

In 1927 Congress passed the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. §901ff, (hereafter Longshoremen's Act) to provide workmen's compensation benefits for longshoremen employees injured in the course of their employment while working aboard vessels on navigable waters. The stevedore employer was made liable to pay compensation which was stated in the Act to be its exclusive liability to its longshoremen employees. 33 U.S.C.A. §905. Congress expressly preserved the right of employees to recover damages from third persons such as a vessel and its owners

who might be found liable for his injuries. 33 U.S.C.A. §933.

In its landmark decision in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946), the Court held that longshoremen were entitled to recover under the general maritime law's liability without fault doctrine of unseaworthiness in addition to their rights under the general maritime law of negligence. At this time the stevedore employer's exclusive liability to his longshoremen employees still appeared to be the compensation benefits of the Longshoremen's Act.

However, the injustices being visited upon third party shipowners under the general maritime law's liability without fault doctrine of unseaworthiness for injuries which were really the fault of the stevedore, prompted the Court to provide shipowners with a cause of action implied from the contractual relationship between the shipowner and stevedore which permitted recovery of indemnity from the stevedore employer if the stevedore breached its implied warranty of workmanlike service. *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.,* 350 U.S. 124 (1956).

Ryan indemnity in turn visited injustices on stevedore employers who were held indirectly liable to their longshoremen employees for damages despite the apparent intent of Congress to make the stevedore's exclusive liability the compensation and medical benefits provided in the Longshoremen's Act. The longshoremen employees also suffered from this situation as the controversy over the injustices being done by the *Sieracki-Ryan* doctrines and how to resolve them resulted in preventing any monetary improvement in the benefits under the Act for over 12 years.[1]

---

1. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 9 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 5, reprinted in 1972 U.S. Code Cong. and Ad. News 4698, at 4703.

The Primary Congressional Concern

While Congress was very much concerned about this unacceptably expensive method of compensating longshoremen for their injuries,[2] when it sought to correct it in making extensive amendments to the Longshoremen's Act in 1972, it was even more concerned about providing "the fullest measure of on-the-job safety" for longshoremen:

> "This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. *It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry,* and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement." (Emphasis supplied)[3]

---

2. A study made by counsel for your Amici covering third party claims in Gulf of Mexico ports from Texas to Florida for the years 1963 to 1967 involving approximately 1,500 claims indicated that approximately 45% to 50% of the cost of the claims went to attorneys representing longshoremen, shipowners and stevedores. Hearings Before the Select Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 92d Cong. 2d Sess., on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023, page 106.

3. S. Rep. at 2. Immediately after quoting this portion of the legislative history, the Court of Appeals for the Third Circuit stresses its importance thusly:

> "This component of the Act is of considerable importance in determining the scope of a vessel owner's duty toward the longshoreman. It is a reminder that the underlying purpose of the Act is to encourage safety on the waterfront within the framework of the relationship established between the stevedore on the one hand and the vessel owner on the other. Thus, in order to impose liability on the vessel owner under Section 905(b), we must be sure that it and not the stevedore is in the position

In amending the Longshoremen's Act in 1972, Congress had two primary purposes in mind insofar as the case presently before the Court is concerned:

1.

Safety—To Eliminate accidents with respect to the high risk occupations covered by the Longshoremen's Act to the maximum extent possible. It sought to accomplish the paramount safety objective by:

(a) Requiring employers to pay fully adequate workmen's compensation benefits to assure that the employer bore "the cost of unsafe conditions, (because this would) serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety,"[4] and

(b) providing a specified cause of action against third party shipowners based solely on negligence which "would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels"[5] than had been the result under the *Sieracki-Ryan* doctrines.

2.

Adequate Benefits—To the extent such accidents could not be eliminated, to provide fully adequate compensation and medical benefits to the injured employee and his family without their having to pursue the uncertainty of seeking damages from a third party.

---

best able to prevent similar accidents from arising in the future." Rich v. United States Lines, Inc., 596 F.2d 541, at 554 (3d Cir. 1979).

4. S. Rep. at 2; H. Rep. at 1 and 4699.

5. S. Rep. at 10; H. Rep. at 6 and 4703.

How Did Congress Approach Its Primary Safety Objective

In order to meet its primary safety objective, Congress made three principal changes with respect to liability for injuries and deaths to employees, their employers and the vessels on which they worked. The 1972 Amendments were a compromise between the interested groups—(1) employees (longshoremen and other harbor workers), (2) employers (stevedores, shipyards, etc.), and (3) third parties (shipowners, their vessels, etc.). Each received substantial "benefits" in return for relinquishing certain "rights" they had against one another:

1.

Vast improvements were made in the compensation benefits payable to covered employees and their beneficiaries. For example, the maximum weekly compensation rate was increased from a flat $70.00 per week to an annually adjusted maximum with increases as the national average weekly wage increased. The present maximum compensation rate is $426.26 per week, 33 U.S.C.A. § 906.[6] The Act's jurisdiction was extended

6. Thus, an employee who has an average weekly wage of $639.39 per week would be entitled to $426.26 per week ($22,165.52 per year) in compensation for total disability. Prior to the 1972 Amendment he would have been entitled to $70.00 per week ($3,640 per year). If he becomes totally and permanently disabled, his weekly compensation rate is increased on October 1st of each year by the same percentage the national average weekly wage has increased. 33 U.S.C.A. § 910 (f) and (g). Based on a 7% per year increase in the future (the 1973 thru 1979 increases averaged 7.11%), a longshoreman 40 years of age with a life expectancy of 31 years, entitled to the present weekly maximum of $426.26 would receive total weekly compensation benefits of $2,263,834. In the 31st year, his weekly compensation rate would be $3,247.00 per week and his total compensation for the year would be $168,844. Prior to the 1972 Amendments his benefits for the 31 years would have totaled $112,840 and he would have received the same $70.00 per week and $3,640 in the 31st year as he had received in the first year. All medical expenses, including related transportation, costs, were provided for in full for

ashore to those employees directly involved in "loading, unloading, repairing, or building" vessels where formerly dockside injuries were covered only by state compensation acts, 33 U.S.C.A. § 903(a).[7]

2.

In return for the vast improvements in compensation benefits and the extension of the Act's jurisdiction ashore, the rights of employees to recover damages from third party shipowners were changed, as follows:

(a) The 1972 Amendments eliminated the liability without fault doctrine of unseaworthiness as a basis for the shipowner's liability,[8] and

(b) Replaced maritime negligence as a basis for the shipowner's liability with a cause of action for negligence in which the shipowner is not to be held liable as a third party unless its negligence is such as would render

---

life prior to 1972. See more detailed discussion of these vast improvements in compensation benefits, *infra,* pages 25 to 28.

7. As many of the maritime states had maximum weekly compensation rates even lower than the Longshoremen's Act's $70.00 per week, the increase in benefits is even greater for these dock-side injuries.

8. "The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port." S. Rep. at 9; H. Rep. at 5 and 4703.

a land-based third party in non-maritime pursuits liable under similar circumstances.[9]

3.

In return for the elimination of the liability without fault unseaworthiness remedy and the replacement of maritime negligence with land-based negligence law, the shipowner was deprived of its implied contractual rights to indemnity from the employer under *Ryan*,[10] and written contracts agreeing to indemnify vessels for damages caused by the vessel's own negligence were declared to be void.[11]

The Accident

Longshoreman Santos was injured when some sacks of wheat fell from a pallet which was being held suspended by the vessel's winch over the area in the cargo hold where Santos had been ordered by the stevedore's gang foreman to clean up some sacks which had been spilled from the

---

9. "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called such as unseaworthiness, non-delegable duty, or the like." S. Rep. at 10; H. Rep. at 6 and 4703.

10. Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956).

11. "The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker." S. Rep. at 11; H. Rep. at 7 and 4704.

pallet some ten minutes earlier.[12] Santos claimed that the brake on the electric winch would not hold the load in place after it was suspended over the men. Only the stevedore and its longshoremen had any knowledge that the winch brake would not hold the load. Santos sought to impose liability on the shipowner claiming it should have discovered the problem with the winch brake and corrected it.

As Stevedore Is Independent Contractor, Shipowner Has No Duty To Supervise Its Operations

The contractual relationship of the stevedore to the shipowner is that of a true independent contractor under land-based negligence principles.[13] The stevedore is given control of those areas of the vessel and its equipment which are needed by it and the stevedore has the complete supervision and control of all the cargo operations.[14]

---

12. The sacks remaining on the pallet after some had been spilled on the deck were in a state of disarray and the pallet could have been placed on or suspended over the main deck or removed to the dock by the stevedore which would have eliminated any risk of the sacks falling on Santos in the vessel's cargo hold. The stevedore's gang foreman was in complete control of the cargo operations as control of this area had been turned over to the stevedore and he alone made the decision to require Santos and the other longshoreman to work with the pallet with its sacks in disarray suspended over their heads.

13. As the Court recognized in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, at 263-266 (1979), Section 905(b) expressly recognized the fact that some shipowners hire longshoremen direct from labor unions and do not use an independent contracting stevedore. In such direct employee situations, however, the working relationship between the shipowner's employees who are members of the crew of the vessel and the shipowner's employees who provide stevedoring services to the vessel is the same as it is where an independent contracting stevedore is used. Thus, when we address the shipowner's duty in the present case, we address the duty of the vessel's crew members where the shipowner employs its stevedoring personnel direct.

14. This is confirmed by the terms of the contracts with the various longshoremen's unions which reserve these cargo operations to the unions and thus prohibit the crew of the vessel from doing any of

A shipowner hires the stevedore as an expert in loading and unloading vessels and to furnish the necessary stevedoring gear for the cargo operations because none of the ship's crew are stevedores. In discussing the question of control under land-based negligence principles of Section 414 of the Restatement (Second) of Torts, the Court of Appeals for the Third Circuit recognizes that the shipowner does not retain any control of the stevedore's methods of work or the operative details of the cargo operations:

> "Comment c to section 414 indicates that the 'ultimate control' over stevedoring operations retained by a shipowner is not the sort of control to which section 414 is directed:
>
> > . . . It is not enough that he (shipowner) has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports . . . Such a general right is usually reserved to employers (shipowner), but it does not mean that the contractor (stevedore) is controlled as to his methods of work, or as to operative detail." *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, at 1251 (3d Cir. 1977).

The Third Circuit therefore correctly held that

> ". . . using the shipowner's ultimate control in order to create a duty of supervision would amount once again to the establishment of a nondelegable duty. As we have declared above, this is what Congress sought to proscribe by enacting amended section 905(b)." 554 F.2d at 1251.[15]

---

this work. A typical example of these contractual reservations is reprinted in Addendum A, *infra*, p. A-1 to A-2.

15. Accord: Lubrano v. Royal Netherlands Steamship Company, No. 79-7228 (2d Cir., March 31, 1980); Cox v. Flota Mercante Grandcolombiano S.A., 577 F.2d 798, at 801 (2d Cir. 1978); Munoz v. Flota Mercante Grandcolombiana S.A., 553 F.2d 837, at 840 (2d Cir. 1977); Rich v. United States Lines, Inc., 596 F.2d 541, at 550 (3d Cir. 1979); Hurst v. Triad Shipping Co., 554 F.2d 1237, at 1251 (3d Cir. 1977), *cert. denied*, 434 U.S. 861 (1978); Riddle v. Exxon

Stevedore Has Duty To Comply With Safety & Health Regulations For Longshoring

Congress recognized that the Safety & Health Regulations for Longshoring were a very vital part of its safety plan when it called for "vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970."[16] These Safety Regulations for Longshoring spelled out in detail, both then and now, what Congress expected of stevedore employers. As many courts have held,[17] these regulations themselves make it abundantly clear that it is the stevedore—not the shipowner—who has the duty to comply with these regulations:

> "The responsibility for compliance with the regulations is placed upon 'employers' as defined in § 1918.3(c)." 29 C.F.R. § 1918.2(a).

Transp. Co., 563 F.2d 1103, at 1113 (4th Cir. 1977); Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030, at 1034 (5th Cir. 1977), *cert. denied,* 435 U.S. 861 (1978); Wescott v. Impressas Armadoras, S.A. Panama, 564 F.2d 875, at 883 (9th Cir. 1977).

16. S.Rep. at 2. The term "Maritime Safety Amendments of 1958" refers to Public Law 85-742, Act of August 23, 1958, Longshoremen's & Harbor Workers' Safety Program which amended Section 41 of the Act, 33 U.S.C.A. § 941, in 1958 to authorize the Secretary of Labor to promulgate safety regulations for longshoring and other maritime employments. The first Safety & Health Regulations for Longshoring became effective on March 21, 1960. The Occupational Safety & Health Act of 1970 simply deemed the regulations for longshoring under 33 U.S.C.A. § 941 (Act of August 23, 1958) to be issued under the 1970 Act until superseded by corresponding standards under the 1970 Act, 29 U.S.C.A. § 653 (b)(2). The longshoring regulations in effect today are still issued pursuant to 33 U.S.C.A. § 941, as no superseding standards have been issued.

17. Chavis v. Finnlines Ltd., O/Y 576 F.2d 1072 (4th Cir. 1978); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979); Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977), *cert. denied,* 435 U.S. 934 (1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364 (2d Cir. 1978); Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), petition for cert. pending No. 79-1240.

> "The term 'employer' means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments. . . ." 29 C.F.R. § 1918.3(c).

At a minimum Congress recognized that unless the stevedore was made to bear the cost of injuries to longshoremen which are caused by the stevedore's failure to comply with the safety regulations, its expressed desire that "every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry" would be thwarted.[18]

Proposed Rule Of Court Below Permits Stevedore To Disregard Safety Regulations

Under the proposed rule of the Court below, the stevedore and Santos claim that the stevedore should bear none of the cost of the injury in this case even though it (1) actually knew the winch brake was not holding the loads properly for two days prior to the injury, (2) had utterly and completely failed to comply with its affirmative duty to eliminate the risk of injury under the following two separate Safety & Health Regulations for Longshoring:

> "Any defect or malfunction of winches *shall be reported immediately* to the officer in charge of the vessel." (Emphasis supplied) 29 C.F.R. § 1918.53(a)(5).

and

> "When the electromagnetic or other service brake is unable to hold the load, *the winch shall not be used.*" (Emphasis supplied) 29 C.F.R. § 1918.53(c)(1).[19]

---

18. S. Rep. at 2 and 12; H. Rep. at 8 and 4705.

19. Compliance by the stevedore with these two regulations is absolutely essential. The alternative would require a vessel's officers to be clairvoyant, since a winch brake that is unable to hold a load

and (3) ordered the longshoremen to work under a pallet suspended over their heads with sacks of cargo already in disarray, one of which fell and caused the injury.

Thus if the stevedore avoids injury to its longshoremen long enough for a judge or jury to say the shipowner should have discovered an unsafe condition, the stevedore's safety incentive is completely removed as apparently it will bear none of the costs of the injury as Congress intended. The stevedore may even be rewarded for its negligence by recovering from the vessel the full amounts it has paid in compensation and medical benefits while the third party action has been pending.[20]

Quite obviously, in cases involving injuries to longshoremen some comparative fault rule such as the one adopted by the Court for vessel collision cases in *United States v. Reliable Transfer,* 421 U.S. 397 (1975) or the one which was proposed in *Edmonds* that the shipowner pay only the percentage of the damages attributable to its fault, would provide the strongest safety incentive for both the shipowner and the stevedore. But the Court rejected any such proportionate fault rule in *Edmonds* because it was concerned that it "might knock out of kilter this

---

is not readily observable except to the winch operator. Even longshoremen in the hold cannot discern whether the erratic behavior of a draft of cargo is caused by a defective winch or improper winch operation. This situation is rendered even more complex by the natural human reaction, shared even by winch operators, to blame alleged malfunctioning machinery rather than human error for improper operation.

20. In view of the Court's recent decision in *Edmonds v. Compagnie Generale Transatlantic,* 443 U.S. 256 (1979), the negligent stevedore may be expected to claim full reimbursement of its compensation and medical expenses from the shipowner. *Edmonds* does not address the issue of whether a negligent stevedore may recover the compensation and medical expenses it has paid, so the issue is an open one. However, there can be no doubt that the negligent stevedore in this case will seek such a full recovery in the same fashion as did the 70% negligent stevedore in *Edmonds.*

delicate balance" for safety which Congress had struck in dealing with the rights and liabilities of stevedores, shipowners and longshoremen in third party cases against shipowners in the 1972 Amendments.[21]

Congress Placed Primary Responsibility For Safety On Stevedore Under Land-Based Negligence Principles

Most of the Courts of Appeals have recognized that Congress thus placed the primary responsibility for the safety of longshoremen on their stevedore employers, and when the stevedore has been in a better position to eliminate the risk of injury than the shipowner, the Courts have declined to impose a duty on the shipowner which would relieve the stevedore of its obligation to bear the cost of an injury as Congress intended by paying compensation under the Longshoremen's Act.[22]

Despite the clarity of the Committee Reports that in a third party action the longshoreman is to be put in the the "same position he would be if he were injured in non-maritime employment ashore" and that the 1972 Amendments were "not to endow him with any special maritime theory of liability,"[23] the Court of Appeals below adopts

---

21. Edmonds v. Compagnie Generale Transatlantica, 443 U.S. 256, at 273 (1979).

22. Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979); Hickman v. Jugoslavenska Linijska Providba Rijeka, Zvir, 570 F.2d 449 (2d Cir. 1978); Cox v. Flota Mercante Grancolombiana S.A., 577 F.2d 798 (2d Cir. 1978), *cert. denied*, 439 U.S. 881 (1978); Munoz v. Flota Mercante Grancolombiana, S.A., 553 F.2d 837 (2d Cir. 1977); Ruffino v. Scindia Steam Navigation Co., Ltd., 559 F.2d 861 (2d Cir. 1977); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir. 1977), *cert. denied*, 434 U.S. 861 (1978); Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977); Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); Riddle v. Exxon Transportation Co., 563 F.2d 1103 (4th Cir. 1977); Chavis v. Finnlines Ltd., O/Y, 576 F.2d 1072 (4th Cir. 1978).

23. S. Rep. at 10; H. Rep. at 6 and 4703.

this Court's maritime theory of liability as set out in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), and labels it the "reasonable care under the circumstances" standard, 598 F.2d at 486. As to any unsafe condition aboard a vessel which causes injury, whether the responsibility of the shipowner or the stevedore, which a judge or jury finds (1) should have been discovered by the shipowner, (2) which the shipowner should recognize as involving an unreasonable risk of harm to a longshoreman, and (3) as to which the shipowner fails to exercise reasonable care to protect the longshoreman imposes liability on the shipowner for all of the costs of the injury. The problem with this "standard" is that it is no standard at all. It permits each judge and each jury to determine who owes what duty and to whom and thus completely frustrates the Congressional safety objective. It makes the shipowner liable for unsafe conditions of which it has no actual knowledge, and therefore does not know anything needs to be done. It completely exonerates the stevedore who does nothing when it has actual knowledge, when it is the only party who knows anything needs to be done and moreover is the only party in a position to eliminate the risk prevailing in the area over which the stevedore has control. Indeed, in this case, it exonerates the stevedore who was negligent per se for violating the Safety & Health Regulations for Longshoring simply if a judge or jury thinks that's a proper result. Thus, if a judge or jury concludes the shipowner ought to have discovered it at any time within a matter of a few hours after it became defective, the safety incentive Congress gave to the stevedore is removed as the stevedore knows it will not have to bear the costs of any injuries and can completely ignore the safety regulations, as it did here for two days prior to the accident.

When Only Stevedore Has Actual Knowledge Of The Condition, Imposing Liability On The Shipowner Defeats Congressional Goal Of Promoting Safety

The result in the Court below imposes liability on the shipowner when the stevedore was the one party which actually knew of the danger in the area under its control and the shipowner merely might have discovered it. Whatever purpose might be served in other cases by making a party without actual knowledge liable, it is undisputed that the one party who in fact knew of the danger had the only real opportunity to avoid the accident. The stevedore is the expert who knows whether the condition is a danger or simply an inconvenience. It has complete control over its own employees and the cargo operations and is in the best position to recognize and avoid any danger. Relieving the stevedore of its obligations to pay the costs of this accident, by making the shipowner pay the costs when it in fact had no knowledge of the danger and could not correct it, utterly destroys the "delicate balance" for safety which the Court has already recognized Congress sought to establish in *Edmonds,* 443 U.S. at 273.

The only way this "delicate balance" for safety can be maintained in the area over which the stevedore has control is to place squarely on the party who has actual knowledge of an unsafe condition, the duty either (1) to stop work to avoid it, or (2) to correct it. The present case is a classic example of the need for just such a rule —only the stevedore had actual knowledge of the unsafe condition in an area over which it had control which resulted in the injury—the pallet, with its sacked cargo in disarray, suspended over the area where the longshoremen were ordered to work by the stevedore and the brakes on the winch allegedly not holding the loads.

Only the stevedore had specific duties imposed by law. It was both the only party and the one in the best position to eliminate the risk of injury (1) by placing the pallet on the vessel's main deck or the dock so the longshoremen would not be exposed to any danger as they picked up the spilled sacks in the hold, or (2) by not using the winch [29 C.F.R. 1918.53(c)(1)], or (3) by reporting the malfunction of the winch immediately to the officer in charge of the vessel [29 C.F.R. § 2918.53(a)(5)] so he could arrange for its repair, or (4) by repairing the winch itself.[24]

Until it has actual notice of an unsafe condition in the area over which the stevedore has control, the shipowner obviously is not in a position to eliminate a risk of injury of which it in fact is unaware.[25]

To insure that at least one of the parties has the Congressional safety incentive (knows that it must bear the cost of injuries) at all times, that party who has actual

---

24. Neither the expert stevedore nor the individual longshoremen suffer any economic loss as a result of any delays resulting from such action by the stevedore as such costs are borne by the shipowner.

25. The oil spill example in the Committee Reports, S. Rep. at 10; H. Rep. at 6 and 4704, is the part usually relied on to urge that constructive knowledge is all that is needed. This may be the proper approach if the oil spill is in an area over which the shipowner has retained actual control, but it clearly is not if the oil spill is in the area under the control of the stevedore. Surely no one would seriously contend that if the oil was spilled by the stevedore in an area under its control, where the stevedore has the duty to clean it up under the Safety Regulations [29 C.F.R. 1918.91(c)] that constructive (or even actual) knowledge of the shipowner should make it bear the cost of any injury to a longshoreman. Certainly not, if the stevedore is to be given the maximum "incentive to provide the fullest measure of on-the-job safety," by being made to bear the cost of such injuries. In any event, there can be no doubt that the "delicate balance" for safety which Congress intended to establish is of paramount importance. To the extent the constructive knowledge concept is inconsistent with or detrimental to the establishment of this "delicate balance" for safety, it clearly must yield to that which furthers the Congressional objective.

knowledge of an unsafe condition in the area under the stevedore's control should have the duty to eliminate the risk of injury. In this case that is the stevedore, and unless it bears the cost of this injury by paying the compensation benefits provided by Congress, it will have no reason to comply with the Safety Regulations or to improve its on the job safety practices as Congress mandated.[26]

---

26. While it clearly is not the situation in this case as the shipowner had no actual knowledge, assuming the stevedore had complied with its obligations to both the shipowner and the longshoreman under the safety regulations by stopping work and reporting the condition of the winches to the vessel's officer, so that both parties had actual knowledge of their condition, what rules should the Court adopt to establish and promote the "delicate balance" for safety between the shipowner, stevedore and longshoreman which Congress directed? Because of the stevedore's superior opportunity to control working conditions and avoid the accident, knowledge by the shipowner is not enough to impose liability; there must also be a duty to act. See, *Rich v. United States Lines, Inc.*, 596 F.2d 541, 552-556 (3d Cir. 1979). Thus, when both have actual knowledge of an unsafe condition in the area under the stevedore's control, the party (vis-a-vis the shipowner and stevedore) who has the duty to correct or eliminate the unsafe condition should be burdened with the Congressional safety incentive, that is, be made to bear the cost of any injury. In this case, if the shipowner had actual knowledge and if it was the control points on the winch, the duty to repair would have been the shipowner's since the safety regulations do not permit the stevedore "to tamper with or adjust electric control circuits" [29 C.F.R. § 1918.53(c)(2)], but if it was the brake as the winch operator testified, both the record and regulations are silent as to which had the duty to repair. However, as with other unsafe conditions it would normally be a simple matter to establish who (vis-a-vis the shipowner and stevedore) had the duty to correct or eliminate the risk of injury. Of course, the principal guide should be the Safety Regulations which affirmatively set out the responsibilities of the stevedore. They are the safety rules Congress recognized and clearly wanted applied. While these regulations expressly do not place "additional responsibilities or duties" on shipowners, they likewise expressly do not relieve shipowners of duties and responsibilities placed on them by law, regulations or custom. Thus, by proof the parties are free to establish any adjustment of their respective duties between themselves by custom or agreement.

Stevedore Assumes Risk Not The Longshoremen

In placing the primary safety responsibility on the stevedore, Congress obviously recognized that all risks of injury which were the responsibility of the stevedore would have to be "assumed" by the stevedore and therefore provided for compensation benefits at an unprecedentedly high level. The admiralty doctrines of comparative negligence and no assumption of the risk have no application where the risk of injury is the stevedore's responsibility for which Congress intended it to pay. It is only after the shipowner has been found to have negligently breached a duty owed to the longshoremen that these two doctrines come into play to require the shipowner to pay damages, except those attributable to the longshoreman's own comparative negligence. That the Court below failed to appreciate this fact is evident from its expressed belief, that longshoremen "face trouble for delaying work" and therefore "we cannot accept the idea that an injured longshoreman cannot recover because he should have demanded that the stevedore halt further loading operations until the stevedore could arrange to improve the working conditions." 598 F.2d at 488. He can and should recover from his stevedore employer as Congress mandated for it is the stevedore alone he must face, if he delays the work in an attempt to get the stevedore to stop work as the safety regulations require! Whatever, if any, inhibitions a longshoreman may have about refusing to work under unsafe conditions have to come from his fear of not being re-employed by the stevedore's gang foreman who picked him up at a labor union shape-up or hiring hall for that day's work—not the shipowner by whom he has never been and probably never will be employed.[27] The risk of injury

27. The shipowner did not hire him and it could not discharge him—only the stevedore could do that. The shipowner could dis-

he may be said to "assume" for this reason therefore is the sole responsibility of the stevedore—not the shipowner—and, as Congress intended, it is only right that he must look to the stevedore to bear the cost of any injury he thus sustains. The stevedore ordered him to work under the suspended pallet with its sacked cargo in disarray—not the shipowner. When he hired out that day to the stevedore, the risk he may be said to have "assumed" was that his stevedore employer might force him to work under unsafe conditions unless he was prepared to demand that the stevedore stop work until the unsafe conditions had been corrected—a risk the shipowner had nothing to do with.

Unless the Court recognizes these factors, the "delicate balance" for safety which Congress sought to achieve will be but an idle dream.[28]

---

charge the stevedore, but not the individual longshoremen. And the Courts of Appeals who have concluded that individual longshoremen "face trouble for delaying work" in the face of unsafe working conditions are living in the far distant past and are taking judicial notice of facts which have no relationship to reality. Some of the most powerful labor unions in the United States represent longshoremen, and they diligently protect their members from unsafe working practices by stevedores and shipowners alike. A stevedore who tries to make trouble for a longshoreman who refuses to work under unsafe conditions will quickly find that longshoreman's labor union not only preventing it, but going so far as to refuse to furnish any longshore labor to that stevedore if necessary to prevent it. This fiction—that the longshore labor unions do not vigorously protect their members from any such 'trouble" from stevedore employers—is just that—fiction, and has not the slightest iota of reality to it. When the shipowner hires the longshoreman as a direct employee, the situation is no different—the longshoreman gets his job through his labor union by being picked up by a gang foreman who has been placed in that position by the labor union. See Addendum A, *infra*, p. A-2 to A-5, for some contractual provisions relating to Gang Foremen.

28. It is in fact somewhat of a misnomer to ever say a longshoreman is being made to "assume" the risk of an injury—even if his own negligence was the sole cause of his injury, he always receives the very generous compensation benefits provided under the Act.

As Congress Intended The Vast Improvements In Compensation Benefits Meet Needs Of Longshoremen

A very important part of this "delicate balance" is the improvement in compensation benefits which were made by Congress in the 1972 Amendments because they

> ". . . are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety."[29]

That Congress made the benefits at the very least adequate to meet the needs of longshoremen and their families can be quickly seen by comparing a few of the present benefits with those prior to the 1972 Amendments:

	Prior 1972	After 1972 Amendments
Maximum Compensation Rate	$70.00 per week = $3,640 per year	$426.26 per week = $22,165.52 per year
Permanent Total Disability (41 year old man with life expectancy of 31 years)	$70.00 per week for 31 years = $112,840	$426.26 per week escalated Oct. 1 each year for 31 years = $2,263,834.[30]
Permanent Partial Loss of Wages	2/3rds of wage loss limited to maximum of $70 per week ($3,640 per year) with a lifetime maximum of $24,000.	2/3rds of wage loss up to maximum of $426.26 per week[31] ($22,165.52 per year) with no lifetime maximum amount.

29. S. Rep. at 2; H. Rep. at 1 and 4699.

30. See Addendum B, *infra*, p. A-5 to A-6 for table showing annual effect of an assumed escalation of 7% per year. Upon the man's death, even if unrelated to the injury, his widow is entitled to 75% of the weekly rate. Thus, if this hypothetical longshoreman died while still 41 years of age, his widow would receive $1,697,875 over this 31-year period. If there is one other beneficiary, the full weekly benefit would be payable.

31. Such compensation is adjustable as the weekly maximum of $426.26 is subject to being increased on October 1 of each year as the national average weekly wage increases.

The adequacy of these weekly benefits is further demonstrated by the fact that they exceed those recommended by the National Commission on State Workmen's Compensation Laws.[32] The National Commission recommended that weekly benefits be based on 80% of an employee's spendable weekly earnings. (Gross earnings less federal income taxes and social security taxes.)[33] An employee (married with two children) who is entitled to the maximum $426.26 per week receives 86.3% of his spendable earnings. A single person receives 97.6%.[34] Each longshoreman also has to pay a percentage of his earnings as "service charges" or "dues" to his labor union, which are not spendable income any more than are income or social security taxes. As he does not have to pay such union dues out of his compensation benefits, when this factor is considered the married employee with two children receives 91% and the single employee receives 103.6% of their pre-injury spendable income.

Even a permanently partially disabled longshoreman who is being compensated for his partial loss of wages receives a higher percentage of his spendable earnings than the 80% recommended. For example, assuming a 40% loss of wages the married employee with two children would have 100.7% of his pre-injury spendable earnings and the single employee 107.4% of his.

---

32. In connection with its passage of the Occupational Safety & Health Act of 1970, Congress established the National Commission on State Workmen's Compensation Laws to 'undertake a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation." 29 U.S.C.A. § 676.

33. The Report of The National Commission on State Workmen's Compensation Laws, 1972, page 56; Compendium, 1973, page 131.

34. See Addendum C, *infra*, page A-7 to A-9, for the mathematical calculations by which all of the percentages of spendable income in this and the next succeeding paragraphs were obtained.

These are by no means all of the improvements in benefits made in the 1972 Amendments,[35] but they are sufficient to demonstrate that the second Congressional purpose has been achieved—to the extent accidents cannot be eliminated, it has provided fully adequate compensation and medical benefits for the longshoremen and their families without their having to pursue the uncertainty of seeking damages from a third party.

Blindfolding The Jury

Based in large part on this Court's decision in *Tipton v. Socony Mobil Oil Company, Inc.*, 375 U.S. 34 (1963) most courts have denied the jury knowledge of the fact that an injured longshoreman has had all of his medical expenses paid, and has been paid very generous benefits now provided under the Act, and that he will continue to be compensated in the future for any permanent disability. This has been done on the theory that this evidence is prejudicial to the injured employee's case against the shipowner. The courts are thus blindfolding the jury, and are requiring the jury to assess the shipowner's conduct with the completely false belief that the injured longshoreman employee has had to rely on charity or fend for himself while recuperating from his injuries, sometimes for years.[36] The prejudice and injustice to the

35. The cost of these improvements in benefits is not insignificant. In New York a stevedore now pays $84.80 per hundred dollars of payroll for coverage under the Act and in Texas, the stevedore pays $51.69 per hundred dollars of payroll. As stevedores derive their income from shipowners, this cost is obviously borne in the end by shipowners.

36. On the damage issue alone, the jury is not even permitted to know that he has been receiving as much as $22,000 a year in compensation, tax free, and will continue to do so as long as he is disabled, for whatever weight they might care to give it in evaluating his possible motive for not having returned to work or to less than full time employment. When the medical evidence on the extent of his physical disability is in conflict, as it almost always is, surely a jury is entitled to have any information which would help them in evaluating the extent of his physical disability and his damages.

shipowner is obvious when the jury is led to believe that he has had no income from any source, has had to pay all of his own medical bills, and will not be compensated by anyone for his past or future losses unless the jury finds the shipowner liable. Whatever the wisdom or justice, if any, of this rule may have been in the past when the compensation rate was $70 per week, it no longer exists when the rate is over $400 per week tax free, and his potential benefits run into the hundreds of thousands of dollars.

To the extent juries are to assess the shipowner's conduct in a given factual situation, they should have all the facts, for indeed this is the most fundamental tenet of our jury system—given the full truth—not just part of it—a jury will provide equal justice to all.[37]

Fifth Circuit Has Followed Congressional Safety Mandate

The Court of Appeals for the Fifth Circuit has followed the Congressional safety mandate by declining to find a shipowner liable as a third party under the Act when the injuries have really been the fault of the stevedore and the stevedore has been in the best position to eliminate the risk of injury.[38] Such an approach has

37. In *Edmonds* the Court stated: "In many cases, of course, the shipowner whose act or omission contributed only a very small percentage of the total negligence will avoid liability on the ground of lack of causation." 443 U.S. at 256, footnote 15. If the Court continues to approve this blindfolding of the jury, which creates the impression that the shipowner is the only source from which the longshoreman will be paid for his injuries, the Court's statement will remain insupportable.

38. Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977); Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), petition for cert. pending No. 79-1240; Roberts v. Andrew Martin Sea Services, Inc., No. 78-2219 (5th Cir., May 30, 1980).

accomplished the "delicate balance" for safety which Congress desired. It has also reduced the impact of third party longshore cases on the federal courts and has used the financial resources of stevedores and shipowners "to pay improved compensation benefits" which prior to the 1972 Amendments were "being spent to defray litigation costs."[39] This is demonstrated in part by what has occurred in the United States District Court for the Southern District of Texas. In fiscal year 1971, of 499 marine personal injury cases filed in the district, 237 or 47.5% of them were third party cases by employees covered by the Longshoremen's Act.[40] In fiscal year 1979, only 306 marine personal injury cases were filed and of these only 30 or 9.8% were by Longshoremen's Act employees.[41] Numerically, there were 193 fewer marine personal injury cases filed in 1979 than in 1971. As there were 207 fewer Longshore Act cases in 1979, it is obvious that substantially all, if not all, of the 38.7% reduction in the Southern District's case load of marine personal injury cases from 1971 to 1979 was a direct result of the 1972 Amendments and the adoption by the Fifth Circuit of those principles of land-based negligence law which achieve the "delicate balance" for safety between shipowners, stevedores and longshoremen that Congress mandated. The adequacy of the vastly improved compensation benefits has undoubtedly been a contributing factor also, because third party actions are no longer needed to replace a longshoreman's economic loss as they were when

---

39. S. Rep. at 9; H. Rep. at 5 and 4702.

40. Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess. on S. 2318, S. 525 and S. 1547, pages 307-310. See Addendum D, *infra*, pp. A-10 to A-13 in which these pages from the Senate Hearings are reprinted and which explain how these figures were obtained under the supervision of counsel for your Amici.

41. These figures for 1979 were obtained in the same manner as those for fiscal year 1971. See Addendum D, *infra*, pp. A-10 to A-11.

the maximum weekly compensation rate was $70.00 per week prior to the 1972 Amendments.

CONCLUSION

Many decisions have been rendered dealing with the shipowner's negligence liability under the 1972 Amendments. The ones that have achieved the "delicate balance" for safety which Congress mandated have done so by applying a basic safety principle which was first stated and applied to this shipowner-stevedore relationship by the Court thusly:

> " * * * that liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not." *Italia Societa Per Azioni De Navigazione v. Oregon Stevedoring Company, Inc.*, 376 U.S. 315, at 324 (1964).

Your Amici respectfully submit that the Congressional safety objective can only be achieved by utilizing this principle to the fullest.

Respectfully submitted,

E. D. VICKERY
3710 One Shell Plaza
Houston, Texas 77002
A.C. 713 224-8380
Attorney for Amici Curiae

ROYSTON, RAYZOR, VICKERY & WILLIAMS
Of Counsel

ADDENDUM A

Extracts from
Deep Sea and Coastwise Longshore and Cotton Agreement, Texas Ports and the Port of Lake Charles, Louisiana, effective October 1, 1977 Terminating September 30, 1980, between West Gulf Maritime Association, Inc., and the South Atlantic and Gulf Coast District, International Longshoremen's Association, and affiliated deep sea locals from Lake Charles, Louisiana to Brownsville, Texas.

GENERAL RULES GOVERNING WORK

Rule 20. Longshore Work

Longshore work shall constitute the loading and discharging of all sea-going vessels, railroad cars at wharf, fitting ships for grain, livestock, building magazine rooms or securing cargoes of any kind, dismantling ships of any kind of fittings, shifting of cargoes, coal or coke, and all labor connected with the loading and discharging of ships, including hoisting cargoes with ships' winches, also including dinkey or jitney drivers, and loading of ship's stores except when store are loaded by ship's crew and except at ports where longshoremen are not available. Longshore labor also includes all men who truck cargo direct to and from pile or car to or from the ship's side to hatches. The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. It is mutually agreed when assorting is necessary when discharging the employment of warehouse labor is optional.

When vessel is in loading or unloading berth, or shifting between loading or unloading berths within the con-

fines of a port, the loading and laying of dunnage and the opening and closing of hatches when in connection with the handling of general cargo and/or cotton, is longshore work and will not be done by ship's crew.

The Employers reserve the right to determine by name from a list furnished by the Deep Sea Local Union those persons who will be qualified to be trained to operate Paceco or similar type cranes.

The Employer will select the individual longshoreman by name from a list furnished by the Deep Sea Local Union to operate container machines.

When direct voice communication is not possible between operators of Paceco and/or similar type cranes and the signalman, then electronic communications must be provided.

Rule 28. Gang Foreman

Before a longshoreman can be included on a list of men eligible as Gang Foremen, he must first meet the following requirements:

(a) Worked at least five (5) consecutive years as a longshoreman unless nomination to Gang Foreman List is mutually agreed on;

(b) Attended a 16-hour Safety Course, as prescribed and administered by the West Gulf Maritime Association.

(c) Qualified to direct any work normally performed by a longshoreman.

It is understood and agreed that clauses (a), (b) and (c) above are applicable to new Gang Foremen effective with the signing of this Agreement.

Within 15 days of the signing of this Agreement, each Local shall submit to the employers in each port a list of the men they consider eligible as Gang Foremen. These men will continue eligible as Gang Foremen until such time as any employer files a complaint against them. Any such complaint shall be filed with a panel of two representatives from the Local and two representatives from the employers other than complainant. Within five days after the filing of a complaint against a man by any employer, said panel shall make a decision that the man in question shall be continued as an eligible gang foreman, or that he shall not. Three votes of this panel shall constitute a decision. In the event of a tie vote of this Panel, or in the event this Panel does not make the required decision within five days, the complaint against the man shall automatically be transferred to the employers as a group, and they shall decide whether the man shall continue as a Gang Foreman or not. In the event the man is removed from the list of eligible gang foremen by the employers, they shall then select a replacement of their choice from additional names furnished by the local.

Gang Foremen will not be accepted for employment unless he has been selected from eligible Gang Foremen List submitted to the employers.

A Gang Foreman failing to carry his own gang shall be removed from the Gang Foremen's List within 5 days unless his absence was due to a legitimate reason.

Gang Foreman shall direct the use of stevedore's equipment and shall prevent the abuse and/or theft thereof.

There shall be only one gang foreman to each working whip. Gang Foremen to be leadermen of their gangs and to have the duty of assigning all men in the gang subject

to supervision and direction of the stevedore, Gang foremen to receive 50 cents per hour over and above other men in the gang.

It is expressly understood that a gang foreman, like other men in the gang, is not hired and does not become an employee of any of the First Parties until he actually reports at shipside ready for work.

Any unresolved dispute under this clause can be referred to the arbitrator.

ADDENDUM B

Table Showing Effect of Assumed Escalation of Benefits of 7% Per Year for 50 Years

Year No.	Weekly Compensation Rate Increased 7% Per Year*	Total Compensation Payable Each Year	Cumulative Total of Compensation
1	$ 426.26	$ 22,165.	
2	456.	23,712.	$ 45,818.
3	488.	25,376.	71,254.
4	522.	27,144.	98,398.
5	559.	29,068.	127,466.
6	598.	31,096.	158,562.
7	640.	33,280.	191,842.
8	685.	35,620.	227,462.
9	733.	38,116.	265,578.
10	784.	40,768.	306,346.
11	839.	43,628.	349,974.
12	898.	46,696.	396,670.
13	961.	49,972.	446,642.
14	1,028.	53,456.	500,098.
15	1,100.	57,200.	557,298.
16	1,177.	61,204.	618,502.
17	1,259.	65,468.	683,970.
18	1,347.	70,044.	754,014.
19	1,441.	74,932.	828,946.
20	1,542.	80,184.	909,130.
21	1,650.	85,800.	994,930.
22	1,766.	91,832.	1,086,762.
23	1,890.	98,280.	1,185,042.
24	2,022.	105,144.	1,290,186.
25	2,164.	112,528.	1,402,714.
26	2,315.	120,380.	1,523,094.
27	2,477.	128,804.	1,651,898.
28	2,650.	137,800.	1,789,698.
29	2,836.	147,472.	1,937,170.
30	3,035.	157,820.	2,094,990.
31	3,247.	168,844.	2,263,834.

32	3,474.	180,648.	2,444,482.
33	3,717.	193,284.	2,637,766.
34	3,977.	206,804.	2,844,570.
35	4,255.	221,260.	3,065,830.
36	4,553.	236,756.	3,302,586.
37	4,872.	253,344.	3,555,930.
38	5,213.	271,076.	3,827,006.
39	5,578.	290,056.	4,117,062.
40	5,968.	310,336.	4,427,398.
41	6,386.	332,072.	4,759,470.
42	6,833.	355,316.	5,114,786.
43	7,311.	380,172.	5,494,958.
44	7,823.	406,796.	5,901,754.
45	8,371.	435,292.	6,337,046.
46	8,957.	465,764.	6,802,810.
47	9,584.	498,368.	7,301,178.
48	10,255.	533,260.	7,834,438.
49	10,973.	570,596.	8,405,034.
50	11,741.	610,532.	9,015,566.
51	12,563.	653,276.	9,668,842.

---

* Rounded to nearest dollar as provided in 33 U.S.C.A. § 910(g).

ADDENDUM C

Mathematical Calculations
Of Spendable Income

Assumptions:

1. Average weekly wages of $639.39 equals $33,-248.28 per year.
2. Weekly compensation of $426.26 (2/3rds of $639.39) equals $22,165.52 per year.
3. Union service charges or dues computed at 3.93% based on such charges or dues in Port of Houston, Texas for fiscal year ending September 30, 1979, deducted from employees' pay checks just like income and social security taxes. From gross longshore wages of $66,302,094.96, such dues totaled $2,604,778.94.

Married longshoreman with two children:

Gross income	$33,248.28
Less income tax	5,985.00
Less social security tax	1,587.67
Sub-total	$25,675.61*
Less union dues	1,306.66
Spendable Income	$24,368.95**

*Spendable income before union dues deducted of $25,675.61 divided into annual compensation of $22,165.52 equals 86.3%.

**Spendable income after union dues deducted of $24,368.95 divided into anuual compensation of $22,165.52 equals 91%.

Single Longshoreman with no dependents:

Gross income	$33,248.28
Less income tax	8,951.24
Less social security tax	1,587.67
Sub-total	$22,709.37*
Less union dues	1,306.66
Spendable Income	$21,402.71**

*Spendable income before union dues deducted of $22,709.37 divided into annual compensation of $22,165.52 equals 97.6%.

**Spendable income after deducting union dues of $21,402.71 divided into annual compensation of $22,165.52 equals 103.6%

Assuming 40% permanent partial loss of wage earning capacity of $13,248.28 and wages earned of $20,000 per year, compensation received would be 2/3rds of $13,248.28 which is $8,832.19 per year.

Married longshoreman with two children:

Gross income	$20,000.00
Less income tax	2,271.00
Less social security tax	1,226.00
Less union dues	786.00
Spendable income	$15,717.00
Compensation	$8,832.19
Total spendable income	$24,549.19*

*Pre-injury spendable income of $24,368.95 divided into spendable income from wages and compensation of $24,549.19 equals 100.7%.

Single man with no dependents:

Gross income	$20,000.00
Less income tax	3,829.00
Less social security tax	1,226.00
Less union dues	786.00
Spendable income	$14,159.00
Compensation	$8,832.19
Total spendable income	$22,991.19*

*Pre-injury spendable income of $21,402.71 divided into spendable income from wages and compensation of $22,991.19 equals 107.4%.

ADDENDUM D

Extract From

Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess. on S.2318, S.525 and S.1547.

May 2, 10, 17, 27 and June 5, 1972
Pages 307-310

A COMPILATION OF THIRD PARTY CASE FIGURES FILED IN THE SOUTHERN DISTRICT OF TEXAS

The erroneousness of the figures supplied to the Committee by Mr. McGuigan on behalf of the AFL-CIO occurred because he considered only the marine personal injury cases filed under the diversity of citizenship jurisdiction of United States District Courts. The figures did not take into consideration the marine personal injury cases filed under federal question jurisdiction including cases filed in Admiralty, which are kept separate for statistical purposes by the Administrative Office of the United States Courts.

A personal conference with Mr. James A. McCafferty, Assistant Chief, Division of Information Systems of the Administrative office of the United States Courts, revealed that there was no way to determine from the statistical information available in the Administrative Office of the United States Courts how many third party longshore cases had been filed either on a nationwide basis or by districts. The only way this statistical information can be obtained is by an examination of the docket sheet of each case filed in each office of a United States

District Clerk. Even this is not certain to reveal all of the third party longshore cases as reviewing the docket sheet only will give you the designation placed on it by one of the deputy clerks. Thus, the accuracy of the longshore third party figures by looking at the docket sheet only is still subject to some error on the low side, and only a personal examination of the district clerk's file with respect to each of its cases would reveal all of the third party longshore cases that have been filed.

In making our study of the docket sheets only, without examining the individual case files, in the Southern District of Texas, only those docket sheets which clearly reflected that the case was a longshoreman's or harbor worker's third party case were counted as being such a third party longshoreman's or harbor worker's case. The time consumed in compiling the statistics in the Southern District of Texas involved an examination of the records of the United States District Clerk's office in Brownsville, Corpus Christi, Galveston and Houston.

The time required to make this study in the Southern District of Texas totaled approximately 60 manhours and involved checking approximately 16,154 docket sheets. Projecting this nationwide, to obtain this information for all of the districts, I estimate would take approximately 2,650 additional manhours, and would involve checking approximately 715,146 additional docket sheets. For the Gulf area the information from the Southern District of Texas should be adequate to demonstrate the erroneousness of the AFL-CIO figures.

The information developed on the Southern District of Texas showed:

Fiscal Year	Total No. of Private Marine Per. Inj. Cases Filed Per Administrative Office of U. S. Courts Under Federal Question & Diversity of Citizenship Jurisdiction	AFL-CIO's Figure on Diversity Jurisdiction	Total No. of Longshoremen's & Harbor Workers' Third Party Cases Filed
1971	499	33	237
1970	450	35	213
1969	403	42	209
1968	337	48	185
1967	331	93	174
1966	260	86	117
1965	269	81	128
1964	278	73	101
1963	229	58	70
1962	284	138	129
Total	3,340	687	1,563
Five Year Totals			
1967-1971	2,020	251	1,018
1962-1966	1,320	436	545

The foregoing figures from the Southern District of Texas demonstrate the continuing growth of the circular liability problem insofar as longshoremen and harbor worker injuries are concerned. During the five year period from fiscal 1962 through fiscal 1966 an average of 109 third party longshore cases per year were filed, with a high of 129 and a low of 70. During the next five years, fiscal 1967 through fiscal 1971, an average of 203 third party longshore cases per year were filed with a high of 237 in 1971 and a low of 174 in 1967. This represents an average increase of approximately 86% for the most recent five year period.

The total number of marine personal injury cases of all kinds filed in the Southern District of Texas increased by 700 during the five year period 1967-1971. Of the 700 case increase, 473 or approximately 67½ % of them were third party longshoremen or harbor worker injury cases.

I believe that these figures graphically demonstrate the continuing growth of the circular liability cases under the Longshoremen's Act in Texas.